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# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1955

No. 172

MICHAEL CAMPODONICO,
*Petitioner,*
vs.
UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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## Subject Index


| | Page |
|---|---|
| Citations to opinions below | 2 |
| Jurisdiction | 2 |
| Questions presented | 2 |
| Statutes involved | 3 |
| Statement | 3 |
| Reasons for granting the writ | 6 |
| Beginning net worth | 6 |
| Leads | 12 |
| Currently taxable income | 14 |
| Importance of issues involved | 16 |
| Conclusion | 17 |

Appendix—Opinion and judgment below.

## Table of Authorities Cited


**Cases** Pages

Calderon v. U. S., 207 F. 2d 377 ..... 9

Friedberg v. U. S., 348 U.S. 142 ..... 5

Holland v. United States, 348 U.S. 121 .....3, 6, 7, 8, 10

Smith v. U. S., 348 U.S. 147 .....6, 9, 14, 16

United States v. Calderon, 348 U.S. 160 .....
.....3, 6, 7, 9, 10, 11, 12, 14, 16

U. S. v. Holland, 348 U.S. 121 ..... 13

U. S. v. Hornstein, 7 Cir., 1949, 196 F. 2d 217.....8, 11, 13

**Rules**

F. R. C. P.:
Rule 22(2) ..... 2

**Statutes**

Internal Revenue Code, Section 145(b)..... 3

26 U.S.C., Section 145(b) ..... 3

28 U.S.C., Section 1254(1) ..... 2, 3

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**PETITION FOR A WRIT OF CERTIORARI**
**to the United States Court of Appeals**
**for the Ninth Circuit.**

*To the Honorable Earl Warren, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the United States:*

Petitioner, Michael Campodonico, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled case on April 27, 1955.

## CITATIONS TO OPINIONS BELOW.

The decision of the United States District Court is not published. The opinion of the Circuit Court of Appeals is printed in the record at pages 311 to 320.

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## JURISDICTION.

The judgment of the Circuit Court of Appeals was entered April 27, 1955. (R. 321.) Petition for rehearing was timely filed May 25, 1955, and denied May 27, 1955. (R. 322.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1), and Rule 22(2).

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## QUESTIONS PRESENTED.

1. Whether the independent evidence involved and contemplated in the statement of the Supreme Court in *United States v. Calderon,* 348 U.S. 160, 165,

> "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

is sufficient, in and of itself, to prove the vital elements of the crime of income tax evasion in a net worth case.

2. Whether such independent evidence is sufficient to convert a net worth method, or system, into a present-worth system so as to eliminate the necessity for a net worth computation.

3. Whether such independent evidence is sufficient to shift the burden of proof, or duty to proceed, to

the defendant to establish the correct amount of the beginning net worth.

4. Whether such independent evidence is sufficient to eliminate ". . . the pressures on the Government to check and negate relevant leads." (*Holland v. United States,* 348 U.S. 121, 139.)

5. Whether such independent evidence was principally, if not exclusively, relied upon to corroborate the admissions of taxpayer in *United States v. Calderon,* 348 U.S. 160.

6. Whether the reputation of defendant, without corroboration, is sufficient to prove a currently taxable income.

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**STATUTES INVOLVED.**

The statutes involved are 26 U.S.C., Section 145(b), 145(b) I.R.C., and 28 U.S.C., Section 1254(1).

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**STATEMENT.**

During the early 1920s petitioner was a bootlegger; from 1927 to 1937 a bootlegger and gambler; and from 1937 to 1942 he gambled and played the horses. During these times he was considered to be a bootlegger, pimp, and gambler by the Stockton Police Department. His gambling activities consisted principally of the operation of card rooms as proprietor and dealer. From 1942 to May 1947 he was employed by the Union Club, a gambling establishment, in the

capacity of floorman, bouncer, and assistant manager. (R. 315.) He did not deal nor otherwise participate in any gambling at the Union Club because a house rule prohibited such activity by employees, but he was suspected of embezzlement from his employer. (R. 311, Tr. 159, 160.) The only direct or circumstantial evidence of petitioner's gambling after 1943 was that he engaged in friendly games of pinochle with friends for small stakes, at which he variously won or lost insignificant amounts, without predominantly winning or losing. (Tr. p. 70.) In 1947 he entered into a partnership for the operation of the Capitola Liquor Store.

During the years 1946 through 1949, petitioner made substantial expenditures for residences, automobiles, boats, and other items, and also invested as a partner in the Capitola Liquor Store. These expenditures formed the basis for an increase in net worth computation by the use of which he was charged and convicted of the crime of income tax evasion. The prosecution was conducted on the net worth theory and the specific issue was the beginning cash on hand. Petitioner reported and paid the taxes on all wages earned and partnership profits.

Defendant was indicted for income tax evasion in five counts covering the years 1946 through 1949, count three being for his wife's taxes for 1947. The trial was commenced May 13, 1952, in the District Court before the Honorable Oliver J. Carter, judge, sitting without a jury. At the close of the Government's case, on May 14, 1952, defendant moved for a

judgment of acquittal, and the trial was continued until further order of the Court in order that briefs might be submitted and appellant's motion be given full consideration. On August 8, 1952, defendant's motion for acquittal was denied, and the United States reopened its case in chief for further testimony, after which, and on the same day, defendant's motion for acquittal was renewed and denied. Defendant rested without submitting any evidence, and the case was continued to September 5, 1952, for final argument, on which date the case was argued and submitted.

On June 13, 1953, Judge Carter adjudged defendant guilty as charged in each count. On July 17, 1953, defendant moved for arrest of judgment, which was denied, but a motion for acquittai was granted as to Counts 4 and 5, or for the years 1948 and 1949. On the same day, defendant was sentenced to imprisonment for 18 months and a fine of $5,000 on Count 1; to imprisonment for 18 months on Count 2, said terms of imprisonment to run concurrently; and no imprisonment or fine on Count 3. Thus the years involved are 1946 and 1947. Notice of appeal was filed July 27, 1953, and bail was set at $6,000.

On July 13, 1954, the appeal to the United States Court of Appeals, Ninth Circuit, was argued and submitted. On January 13, 1955, the submission was vacated to permit counsel to file, within 30 days, supplemental briefs in light of the four decisions of the Supreme Court handed down December 6, 1954, in the cases of *Friedberg v. U. S.*, 348 U.S. 142; *Hol-*

*land v. U. S.*, 348 U.S. 121; *Smith v. U. S.*, 348 U.S. 147; and *U. S. v. Calderon*, 348 U.S. 160.

The supplemental briefs were filed within the 30 days period allowed, and on April 27, 1955, the Circuit Court rendered its decision affirming the judgment of the District Court.

On May 25, 1955, appellant filed his petition for rehearing by the Circuit Court, which was denied on May 27, 1955.

In the above mentioned four decisions of the Supreme Court the subjects of independent evidence and leads were discussed at length. The Court of Appeals paraphrased the meaning of this independent evidence to be equivalent to a present-worth system, and thereby added a connotation not believed warranted. The Court of Appeals omitted to discuss the pertinent leads in the instant case.

The issue in the instant case is not so much involved with the amount of the tax liability as it is with the years the deficiencies were incurred. Criminal prosecution for all years prior to 1946 was and is barred by the statutes of limitation so that the Government charged criminal violations for the years 1946 through 1949.

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## REASONS FOR GRANTING THE WRIT.

### BEGINNING NET WORTH.

The principles applied by the Court of Appeals in determining the beginning net worth are in conflict

with the decisions of the Supreme Court in *U. S. v. Calderon,* and *Holland v. U. S.,* supra. These principles are also in conflict with the lower Court decision of another panel of the Court of Appeals for the Ninth Circuit, in the lower Court decision of the *Calderon* case.

The beginning cash on hand is the important issue in the instant case. The examining agent fixed this amount at zero ($0.00), while petitioner claimed approximately $60,000. At the trial the agent testified.:

> ". . . He found no evidence of any cash on hand at the end of 1945", and that, "he . . . examined the public records, inquired at all local banks, and made an audit of the Capitola Liquor Store, and questioned the appellant in order to determine his net worth at the end of the years 1945 to 1949, inclusive." (Summarized from Record, pp. 313, 314; Tr. 109.)

The evidence discloses that appellant had two safety deposit boxes in a local bank at this time, in which he told the examining agent (Tr. p. 299) he had in excess of $60,000 in cash and securities; and that he had accumulated this money from his prior activities of bootlegging, gambling, and connections with houses of prostitution. The agent also had a lead that appellant had been guilty of embezzlement. (R. p. 315.)

The Court of Appeals determined the above evidence sufficient to sustain the finding of the agent that appellant had no beginning cash on hand. The

District Court trial judge remarked, "Isn't it strange that he had no cash when he started?" (Tr. p. 230.)

In its decision the Court of Appeals relied upon *U. S. v. Hornstein,* 7 Cir., 1949, 196 F. 2d 217, 220, quoting:

> "Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved."

In its conclusion, the Court of Appeals stated:

> "In the instant case, the appellant has wholly failed 'to overcome the inferences to be drawn from the facts proved'."

These principles are believed to be directly in conflict with the principles announced by the Supreme Court in the *Holland* case, p. 132:

> "We agree with petitioner that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net worth, to serve as a starting point from which to calculate future increases in the taxpayer's assets."

Also at p. 138:

> "Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes."

The Court of Appeals did not comment upon what facts were proved, neither does the record reveal any facts to support the inferences mentioned, aside from the financial circumstances of taxpayer during the prosecution years, and his failure to report for taxes a compatible amount. There was no evidence of a distressed financial condition of taxpayer during pre-prosecution years.

This financial condition evidence is believed to be the independent evidence referred to by the Supreme Court in the *Calderon* and *Smith* cases. The Court of Appeals adopted an interpretation of the meaning and potentialities of this independent evidence which is in direct conflict with the *Calderon* case, but which is based upon a statement appearing therein at page 165:

> "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

In effect the Court of Appeals held that the independent evidence mentioned is sufficient, in and of itself, to sustain a conviction for income tax evasion in a net worth case. This is evident from the following circumstances.

Petitioner appealed from the judgment of the District Court, in the instant case, and in his appeal brief cited the decision of another panel of the Ninth Circuit Court of Appeals in *Calderon v. U. S.*, 207 F. 2d 377, 378, in support of his contention that:

> "The burden of proof is on the prosecution as to each pertinent starting item of the net worth statement to a reasonable certainty."

Citations in the footnote are:

> "*Bryan v. United States,* 175 Fed. (2d) 223, 226 (Cir. 5); *United States v. Fenwick,* 177 Fed. (2d) 488 (Cir. 7)."

This is in line with the above stated quotations from the *Holland* case to the effect that the establishment of an opening net worth, with reasonable certainty, is an essential condition in a net worth case; and that the burden of proof does not shift to the taxpayer.

Petitioner also relied upon the further statement of the other panel of the Court below, wherein Chief Judge Denman stated:

> "The question here is whether admissions of Calderon were properly received in evidence absent any independent evidence of the crime of tax evasion."

This is in line with the Supreme Court decision in the *Calderon* case wherein at pp. 164, 165, it is stated:

> "Unlike Smith, there is not sufficient evidence here of the taxpayer's financial history to substantiate directly the opening net worth." . . . "This sketchy background can hardly give rise to an inference that defendant had no more cash at the starting date than the Government gave him credit for."

> "Accordingly, we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method."

Without discussing the principles or grounds for reversal in the *Calderon* case, the Court of Appeals, in the instant case, summarily stated that the *Calderon* case was reversed:

> "It is easily understandable that the appellant should be 'disturbed' over Calderon. It damaged his argument considerably when, as we have seen, it reversed this Court's decision in that case—a decision upon which the appellant had relied so heavily that he cited or quoted from it five times in his briefs!"

Similarly, the Court of Appeals failed and neglected to discuss the nature and purposes of the independent evidence treated by the Supreme Court, except as a discussion of this term might be implied from the use by the Court below of the term, present-worth system. Certainly it is not clear whether the term, present-worth system, was intended to be used as a counterpart of the term, net worth method. From the statements made, it may be readily assumed that the present-worth system is of broader significance—so broad in fact as to eliminate the necessity of establishing a beginning net worth. This follows from the bare statement that the lower Court decision in the *Calderon* case, which was cited as authority for the necessity of establishing a satisfactory beginning net worth, was reversed. And this conclusion is buttressed by the accepted precept of the *Hornstein* case,

that, evidence of unexplained funds in the hands of a taxpayer establishes a prima facie case of income tax evasion.

The Court of Appeals used the term, present-worth system or method, three times when, it would seem, the use of the term, net worth method, would have been more appropriate. Probably this is the explanation for the failure of the Court below to discuss the independent evidence treated by the Supreme Court. At any rate it appears that the said independent evidence was not confined by the Court below in its use for corroboration purposes alone. Thus the decision of the Court of Appeals is in conflict, in principle, with the Supreme Court decision in the *Calderon* case, in holding that independent evidence may be used to prove the vital elements of the crime, and that it is not confined in its use for corroboration purposes. It is of extreme importance that the quality of and the purposes for which independent evidence may be used be clarified.

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**LEADS.**

The decision of the Court of Appeals is void of any comment on the effect of leads, and there is no evidence in the record of any investigation into leads, for the purpose of determining a probable source of funds to account for the expenditures made.

The decision does comment upon leads, however, but for another purpose, namely, to sustain the finding of a currently taxable source of income.

The Government had leads of probable sources of pre-prosecution years income from (1) bootlegging, (2) gambling, (3) prostitution, and (4) embezzlement. (R. p. 315.) These activities extended from the 1920s until 1943. Petitioner told the examining agents that he had in excess of $60,000 in cash and securities in a safety deposit box in a local bank immediately preceding and at the commencement of the first prosecution year of 1946. The evidence of the Government's witnesses is that all of these activities were lucrative; and there is no evidence of any losses or strained financial condition of the taxpayer during the pre-prosecution years.

The only plausible surmise to justify the failure of the examining agent to investigate the leads furnished, and the consequent omission of the Court of Appeals to comment upon the necessity for such lead investigation, appears to be that the Court of Appeals considered such investigation unnecessary. This is in line with the decision of the Court of Appeals in adopting the policy of the *Hornstein* case, supra, to the effect that the present-worth circumstances of the taxpayer establishes a prima facie case, and that it is then incumbent upon the defendant to assume the burden, or go forward with the evidence, to establish the authenticity of the leads furnished.

This is in direct conflict with the decision of the Supreme Court in *U. S. v. Holland,* 348 U.S. 121, 136:

> "When the Government fails to show an investigation into the validity of such leads, the trial

judge may consider them as true and the Government's case insufficient to go to the jury."

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CURRENTLY TAXABLE INCOME.

The Court of Appeals relied upon the use of the present-worth system, together with uncorroborated reputation, to establish a currently taxable income. (R. p. 317.) This is certainly far-fetched, and is another example of the erroneous interpretation of the character and potentialities of the independent evidence discussed by the Supreme Court in the *Calderon* and *Smith* cases.

The conflict revolves about the admission of taxpayer that he was a gambler. Petitioner maintains that the admission related to the pre-prosecution years, while the Government contends that the admission relates to the prosecution years period. Government witnesses testified that defendant did not gamble during the prosecution years except for sociable pinochle games for small stakes which were alternately won and lost by defendant. The evidence of petitioner's gambling with Rosario Mandalari (R. p. 314) related exclusively to such sociable games.

The Court of Appeals comments upon the reputation of petitioner as follows:

> "When Revenue Agent Taynton asked the chief of police of Stockton 'if he could give any information on Mike Campodonico, . . . he said, 'Mike Campodonico, oh, yes—a pimp and a gambler'." (R. p. 314.)

There is evidence in the record that this statement of the Stockton officer related to the pre-prosecution period.

This is the basis for remarks of the lower Court: "There is in the record ample corroboration of appellant's damaging admissions." (R. p. 318.) . . . "It was not necessary for the appellee to put upon the witness stand a parade of gamblers —or worse!—to affirm that on such and such a night they lost so many dollars to the appellant. His associates were not of the type that would volunteer information to the Government. Their reluctance, however, affords no reason why the appellant's responsibility for a loss to the federal fisc should go unwhipped." (R. p. 320.) . . . "In the case of an admitted and notorious gambler the 'likely source' would be winnings from gambling." (R. p. 317.)

Thus it apears that the "ample corroboration" of appellant's damaging admissions is nothing more than reputation, and extremely doubtful as to time, without any direct corroboration; unless, the so-called present worth system is amply sufficient to provide the corroboration required to constitute uncorroborated reputation into competent evidence.

The fallacy of this reasoning is apparent when it is considered that the gambling activities of petitioner is claimed to have produced the funds during pre-prosecution years to account for the expenditures made during prosecution years. This is consistent with the present-worth of taxpayer. Consequently, the present-worth of taxpayer corroborates his state-

ment that he had a large beginning net worth. This is another instance or condition which calls for clarification of the meaning of independent evidence commented upon by the Supreme Court in its four net worth cases handed down December 6, 1954.

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IMPORTANCE OF ISSUES INVOLVED.

The issues in the instant case are concerned with rules of evidence in net worth cases, involving such matters as corroboration, presumptions, inferences, and the quantum and quality of the evidence relied upon. There is diversity of opinion in the circuits, not only in regard to the matters stated, but also in regard to the interpretation of the recent four net worth decisions of the Supreme Court.

These matters are of extreme importance to (1) The Government's prosecution counsel, (2) Defense counsel, and (3) The administrative agents of the Government in investigating income tax cases and their coincidental duty to provide the evidence required for a prosecution.

It is not necessary to detail the duties and responsibilities of the parties mentioned. Their courses of action are intimately connected with and dependent upon the decisions of the Federal Courts. There is grave diversity in the interpretation of the meaning of the independent evidence discussed in the *Calderon* and *Smith* cases. It is respectfully urged that this term requires clarification.

## CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated, Stockton, California,
June 20, 1955.

Respectfully submitted,
MAXWELL M. WILLENS,
WILLENS AND BOSCOE,
*Counsel for Petitioner.*

DONALD D. BOSCOE,
*Of Counsel.*

CERTIFICATE OF COUNSEL

I, the undersigned, Maxwell M. Willens, counsel for petitioner herein, hereby certify that in my judgment and opinion the foregoing petition for a Writ of Certiorari is well founded, and that it is not interposed for purpose of delay.

Dated, Stockton, California,
June 20, 1955.

MAXWELL M. WILLENS,
*Counsel for Petitioner.*

**(Appendix Follows.)**

## Appendix

*United States Court of Appeals*
*For the Ninth Circuit*

| | |
|---|---|
| MICHAEL CAMPODONICO, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.* | No. 14,089 Apr. 27, 1955 |

On Appeal from the District Court of the United States for the Northern District of California.

Before: MATHEWS, HEALY and LEMMON, Circuit Judges

LEMMON, Circuit Judge:

Unlike many other trapped tax-evaders, the appellant does not maintain, like Abimelech of Gerar, that "In the integrity of my heart and innocency of my hands have I done this".[1] With his admitted record of gambling, bootlegging, embezzlement, perjury, and prostitution, such a protestation of purity would hardly be convincing.

On the contrary, the appellant relies upon such technical defenses as these:

[1]GEN. 20:5.

"The case at bar is not a proper case in which to apply the net worth theory as it did not clearly and accurately establish by competent evidence the net worth of the appellant for any one of the tax years in question, nor did it produce evidence that excluded all possible sources of taxable income from which any increase of net worth and the excess expenditures could have been derived."

"A strict interpretation of corroboration requirements for circumstantial evidence when used to establish a beginning net worth has been established" by four Supreme Court cases.

Our task, then, is to examine these and similar finespun arguments with the requisite amount of dispassionate judicial calm.

1. *Statement Of The Case*

The indictment, in five counts, charged violations of 26 USCA §145(b), which punishes "Failure to collect and pay over tax, or attempt to defeat or evade tax". Count One alleged that, for the year 1946, the appellant filed a fraudulent joint income tax return for his wife and himself, understating their income tax by $11,730.98. Count Two made similar allegations regarding the appellant's separate return for 1947, charging an understatement of $2,237.47. Count Three dealt with the wife's tax for 1947, alleging that he filed a fraudulent return for her showing the tax due to be $2,317.97 less than the correct amount. In Count Four, it was alleged that the appellant's joint return for 1948, for himself and his wife, was

fraudulently $488.52 less than the correct amount. Count Five alleged that the appellant fraudulently understated the joint income tax of his wife and himself for 1949 by $4,775.94.

The appellant waived a jury trial on May 13, 1952, when the taking of testimony began. On May 14, 1952, at the close of the appellee's case, the appellant moved for a judgment of acquittal. The trial was continued in order that briefs might be submitted and that the appellant's motion might be considered by the Court. On August 8, 1952, the trial judge denied the motion for acquittal, and the appellee reopened its case in chief by putting on another witness. The appellant renewed his motion for acquittal, which was denied. The case was continued to September 5, 1952, for final argument.

On June 13, 1953, the trial judge filed a "memorandum and order" adjudging the appellant guilty on each of the five counts, and fixing July 3, 1953, as the date for "judgment and sentence". On July 17, 1953, the appellant filed a motion in arrest of judgment, alleging that the Court was "without jurisdiction of the offense and the defendant, in that the defendant has been deprived of a speedy trial in violation of the Sixth Amendment . . ." This motion was denied. On the same day, the Court sentenced the appellant to eighteen months' imprisonment and fined him $5,000 on Count One, and sentenced him to eighteen months' imprisonment on Count Two, the sentences to run concurrently. No sentence was imposed as to Count Three, and the

appellant's motion for acquittal was granted as to Counts Four and Five.

In view of the appellant's argument, to be discussed hereafter, based upon the Sixth Amendment, the chronology of the trial has been given somewhat fully.

2. *The Appellee's Evidence.*

It is hornbook law that even in a criminal case tried to the court, an appellate tribunal will consider the evidence most favorably to the prosecution and will resolve all reasonable intendments in support of the verdict or the judgment.[2] In the instant case, however, our task is further simplified by the fact that the appellant put no witnesses upon the stand but presented his case in the form of certain stipulations that need not be rehearsed here.

The appellee's case, then, may be briefly summarized as follows:

From 1943 or 1944 to May, 1947, the appellant was a bouncer, floor man, and substitute manager of a gambling house in Stockton, California. We have already referred to some of his other activities.

His income tax returns for 1945 to 1949, inclusive, were prepared by Mrs. Eva M. McNabb, his employer's bookkeeper.

Chester R. Taynton, an Internal Revenue Agent, investigated the appellant's income tax liabilities. He

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[2]Pasadena Research Laboratories v. United States, 9 Cir., 1948, 169 F. 2d 375, 380, certiorari denied, 335 U.S. 853-854, and Norwitt v. United States, 9 Cir., 1952, 195 F. 2d 127, 134, certiorari denied, 344 U.S. 817.

asked for the appellant's books and records, but was given none. The appellant said that he kept no books. The Revenue Agent then attempted to assemble information with respect to the appellant's net worth. He found no evidence of any cash on hand at the end of 1945, but discovered that at the end of 1946 the appellant had cash on hand amounting to $23,247.25. The appellant's entire assets as of December 31, 1945, totaled $10,525.00.

Taynton examined the public records, inquired at all local banks, and made an audit of the Capitola Liquor Store, in which the appellant had a one-half interest.

The Internal Revenue Agent testified that the appellant said "his personal living expenses ran around $60 a month, and the Bureau's records of taxes paid showed $166.76 in 1946, $143.74 in 1947, $804.73 in 1948, and $295 in 1949".

For the year 1946, the increase in net worth was $34,296.67; for 1947, it was $23,140.77; for 1948, the gain was $6,297.08; and for 1949, the increase was $20,190.78.

In his reply brief, the appellant challenges the appellee's statement "that appellant was well known as a gambler during the years involved". Says the appellant:

> "Consider this bald statement in the light of the testimony of *all* the Government witnesses that he is not a gambler." (Emphasis is the appellant's)

The foregoing statement is grossly erroneous. Rosario Mandalari testified that he played cards with the appellant for money.

When Revenue Agent Taynton asked the chief of police of Stockton "if he could give me any information on Mike Campodonico, . . . he said, 'Mike Campodonico, oh, yes—a pimp and a gambler'."

Taynton asked the appellant "where he got all the money to buy all the assets when he hadn't reported that much income", and the latter replied that "he made it gambling"—that "he was a gambler".

Wareham Seaman, a tax attorney, retained by the appellant, testified concerning a meeting held in his office on May 4, 1950, at which Shirley S. Atkin, a Special Agent of the Intelligence Unit of the Bureau of Internal Revenue; Taynton, Seaman, and the appellant were present. At that conference the appellant made a sworn statement which, at a meeting held in Seaman's office on May 31, 1950, the appellant refused to sign "because it did not represent the truth". Atkin requested that the appellant make another statement that would be the truth, but the appellant, according to Seaman, "stated that he would not make this statement, upon my advice".

During the cross-examination of Seaman, counsel for the appellant announced that the attorney-client privilege was being "waived completely".

Thereupon Seaman gave some illuminating testimony relative to the appellant's four separate and distinct explanations for "The entire increase in his

assets for the years '46 to '49". The conflicting versions or "positions" were given to Seaman, his own lawyer:

1. "Well, as originally reported to me, and as stated in the statement of May 4, he stated that his income had been accumulated prior to [1943]. It had been accumulated from, as I said, gambling and prostitution, bootlegging . . . Going back, as I recall, as far as in the twenties. . . . That was his first position."

2. "As I recall, his next position was that he had accumulated all but $45,000, or approximately that, up until 1943, and that was from embezzled funds subsequent to '43; any increase since that was from embezzled funds."

3. "As I recall, his third position was that all of it had been accumulated from embezzled funds.

"Q. Not just the forty-five?

"A. Just the forty-five."

4. "I believe his final position on that was that the $40,000 had come from other than embezzled funds.

"Q. From what source?

"A. Gambling, from gambling.

"The Court. During what period?

"The Witness. From '43 on."

From the foregoing, it is clear that the appellant did not heed Mrs. McNabb's advice: "Never lie to your doctor or your attorney".

3. *The Appellee Presented Substantial Evidence Of A Beginning Net Worth For The Appellant, As Well As Evidence Of His Assets And His Expenditures For 1946 and 1947.*

As we have seen the appellant kept no books. In such a situation the appellee had a right to resort to the net worth increase-expenditures method of arriving at the appellant's income tax liability. In Holland v. United States, 1954, 348 U.S. 121, 129, the Supreme Court, while recognizing the "pitfalls inherent in the net worth method", was careful to add that the "pitfalls" cannot be said to "foreclose its use".

"Evidence of unexplained funds or property in the hands of a taxpayer establishes a prima facie case of understatement of income. It is then incumbent on the defendant to overcome the logical inferences to be drawn from the facts proved." United States v. Hornstein, 7 Cir., 1949, 176 F 2d 217, 220.

In the instant case, the appellant has wholly failed "to overcome the inferences to be drawn from the facts proved".

The appellant relies heavily upon the case of Calderon v. United States, 9 Cir., 1953, 207 F 2d 377, 378, quoting therefrom at some length and declaring that it "alone is sufficient authority to reverse the case at bar". The *Calderon* case, however, was reversed by the Supreme Court on December 6, 1954, 348 U.S. 160.

We have carefully examined the record relating to the appellant's assets and expenditures for the years

in question, summarized above, and we find that the appellee's evidence relating to the beginning net worth and the increase in net worth supported the judgment of the trial court.

The appellee "is not required to prove a negative or to refute all possible speculation as to the source of the appellant's asserted funds". Gariepy v. United States, 6 Cir., 1951, 189 F 2d 459, 463, and cases cited. The *Gariepy* case is cited in an annotation in 97 L. Ed. 71.

Nor need the appellee "prove with mathematical certainty the precise amount of unreported, taxable income". Jelaza v. United States, 4 Cir., 1950, 179 F 2d 202, 203, and cases cited.

The appellant is inconsistent in his statements as to whether the appellee is required to establish a *possible* or a *probable* source of the taxpayer's income under the present-worth system. On one page of his reply brief, the appellant says:

> "It is significant that Counsel for the Government has failed to name one case dispensing with the requirement of a *probable* source of income, and has chosen instead to rely upon isolated statements in the above authorities cited, in which a *possible* source of income was established." [Emphasis supplied]

On the next page, however, the appellant relaxes his requirement to a *possible* source of income:

> "It is submitted that had the Government known that the law requires the Government to establish a *possible* scurce of income, this prose-

> cution would never have been undertaken." [Emphasis supplied]

Finally, in the very next paragraph, the appellant goes back to the "probable" test:

> "It appears from the brief of the Government in this case that there is no substantial disagreement as to the requirement in a net worth case that: (1) A satisfactory beginning net worth must be established; and (2) that a lucrative business or calling must also be proven [sic], to establish a *probable* source of taxable income." [Emphasis supplied]

Be that as it may, the correct rule is authoritatively laid down in Holland v. United States, supra, 348 U.S. at pages 137-138:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source from which the jury could reasonably find that the net worth increases sprang, is sufficient."

A carefully scrutiny of the transcript in this case convinces us that the appellee has adduced adequate "proof of a likely source" from which the trial judge "could reasonably find that the net worth increases sprang". In the case of an admitted and notorious gambler the "likely source" would be winnings from gambling. And it is too well settled to require citation of authority that such winnings constitute taxable income.

In four decisions handed down by the Supreme Court on December 6, 1954, lucid semaphores have

been set up for the guidance of lower federal courts in the determination of income tax cases in which the taxpayer's non-existent or imperfect bookkeeping makes necessary a recourse to the present-worth method in arriving at his tax liability. In addition to the *Calderon* and *Holland* cases, already referred to, our highest tribunal has given us illuminating decisions in Friedberg v. United States, 348 U.S. 142, and in Smith v. United States, 348 U.S. 147. The importance of these four cases is emphasized in a per curiam decision handed down by the Supreme Court itself on January 10, 1955, appearing in 348 U.S. 904.

It is quite apparent that the appellant is not pleased with at least two of the foregoing decisions, since he devotes five pages of his supplemental brief to a categorical statement of their alleged "isolated apparently conflicting statements". In addition, the appellant labels as "Disturbingly incomprehensible" the statement in United States v. Calderon, supra, 348 U.S., at page 165, that "we must search for independent evidence which will tend to establish the crime directly, without resort to the net worth method".

It is easily understandable that the appellant should be "disturbed" over *Calderon*. It damaged his argument considerably when, as we have seen, it reversed this Court's decision in that case—a decision upon which the appellant had relied so heavily that he cited or quoted from it five times in his briefs!

Be that as it may, those four decisions are now the law of the land. We believe that in the instant case

the appellee has met the standards there laid down. There is in the record ample corroboration of the appellant's damaging admissions.

4. *The Trial Court's Delay In Pronouncing Judgment Did Not Cause It To Lose Jurisdiction.*

The appellant specifies as error the lower court's denial of "appellant's motion in arrest of judgment upon the grounds that the Court had lost jurisdiction to pronounce judgment therein in that the appellant had been denied a speedy trial in violation of the Sixth Amendment to the Constitution of the United States".

It is urged that "a year and two months from the beginning of a criminal trial lasting only twelve to fourteen hours, to the pronouncement of judgment, is utterly unfair and a denial of one's rights," etc.

Rule 48(b) of the Federal Rules of Criminal Procedure reads as follows:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

The appellant was indicted on November 26, 1951, and was brought to trial on May 3, 1952. That is not an inordinate delay.

The gravamen of the appellant's plaint, however, relates, as we have just said, to the lapse of time

from the beginning of the trial to the pronouncement of judgment.

The appellant refers to four decisions as supporting his contention. Three of them are not in point: the delay occurred *after* a conviction by a jury or a plea of guilty. In the instant case, the delay occurred *before* the Court handed down its judgment of conviction. And even in two of those three cases, the convictions were *affirmed*. The fourth case, Pinkussohn v. United States, 7 Cir., 1937, 88 F 2d 70, 71, certiorari denied, 1937, 302 U.S. 702, was indeed tried to the Court, and the judgment was delayed for six months. But *Pinkussohn* does not aid the present appellant: the conviction was *affirmed*. The Circuit Court of Appeals did, however, deplore "the long delay that elapsed before the simple case with few or no legal questions involved, was disposed of."

In the instant case, it could hardly be said that there are "few or no legal questions involved", when the parties have filed five briefs in this Court and the Supreme Court has found it advisable to hand down four simultaneous decisions on the vexing subject of present worth alone.

Finally, the appellant does not deny that he did not demand a speedy trial, but contents himself with observing that—

> "It certainly would have been an inappropriate act for the appellant to have brought mandamus to compel a Court to render its decision, especially so, since nearly all of the remarks of

the Court in reference to the sufficiency of the evidence were favorable to the appellant."

If the appellant deemed it the better strategy not to press the trial court for a quick decision, he cannot now complain when the delayed judgment happens to have gone against him!

It is well settled in this Circuit that "The constitutional guaranty of a speedy trial is a personal right which may be waived by failure to assert it. Collins v. United States, 9 Cir., 157 F 2d 409."[3]

We know of no Constitutional, statutory, or judicial pronouncement that forbids a busy court from taking ample time to ponder involved and troublesome questions of law and of fact before handing down a decision. Speedy justice does not mean hasty justice.

5. *Conclusion*

The appellee's agents made a painstaking effort to reconstruct the appellant's net worth increase and expenditures for the crucial years of 1946 and 1947. The means that they employed and the results at which they arrived have already been adumbrated herein. The minutiæ of the investigations need not be detailed.

It was not necessary for the appellee to put upon the witness stand a parade of professional gamblers—

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[3]Danziger v. United States, 9 Cir., 1947, 161 F. 2d 299, 301, certiorari denied, 1947, 332 U.S. 769. See also Daniels v. United States, 9 Cir., 1927, 17 F. 2d 339, 344, certiorari denied, 1927, 274 U.S. 744-745; Iva Ikuko Toguri D'Aquino v. United States, 9 Cir., 1951, 192 F. 2d 338, 349-350, certiorari denied, 1952, 343 U.S. 935.

or worse!—to affirm that on such and such a night they lost so many dollars to the appellant. His associates were not of the type that would volunteer information to the Government. Their reluctance, however, affords no reason why the appellant's responsibility for a loss to the federal fisc should go unwhipped.

The judgment is affirmed.

(Endorsed:) Opinion. Filed Apr. 27, 1955.
Paul P. O'Brien, Clerk.

*United States Court of Appeals*
*For the Ninth Circuit*

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|---|---|
| MICHAEL CAMPODONICO, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.* | No. 14,089 |

## JUDGMENT

Appeal from the United States District Court for the Northern District of California, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered: April 27, 1955.

Paul P. O'Brien, Clerk.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statute involved | 2 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 11 |


## CITATIONS

Cases:


| | |
|---|---|
| *Barcott* v. *United States*, 169 F. 2d 929 | 7 |
| *Brodella* v. *United States*, 184 F. 2d 823 | 9 |
| *Friedberg* v. *United States*, 348 U.S. 142 | 7 |
| *Gariepy* v. *United States*, 189 F. 2d 459 | 9 |
| *Holland* v. *United States*, 348 U.S. 121 | 7, 8-9 |
| *Smith* v. *United States*, 348 U.S. 147 | 8, 10 |
| *United States* v. *Calderon*, 348 U.S. 160 | 8 |


Statute:


| | |
|---|---|
| Internal Revenue Code of 1939, Sec. 145 (26 U.S.C. 1952 ed., Sec. 145) | 2 |

# In the Supreme Court of the United States

OCTOBER TERM, 1955

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No. 172

MICHAEL CAMPODONICO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The memorandum of the District Court (R. 9-12) is not reported. The opinion of the Court of Appeals affirming the judgment of the District Court (R. 311-320) is reported at 222 F. 2d 310.

### JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1955 (R. 321), and a petition for rehearing was denied on May 27, 1955 (R. 322). The petition for a writ of certiorari was filed on

June 22, 1955. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether the evidence was sufficient to sustain petitioner's conviction on charges of wilfully attempting to evade income taxes.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

STATEMENT

On November 26, 1951, a five-count indictment was filed in the United States District Court for

the Northern District of California charging petitioner with wilful attempted evasion of the federal income taxes due and owing by himself and his wife for the calendar years 1946 to 1949, inclusive, in violation of Section 145(b) of the Internal Revenue Code of 1939. The amounts of net income and the tax liability thereon, as reported in the returns and as corrected, were alleged to be as follows (R. 3-7):

| Year | Reported | | Corrected | |
|---|---|---|---|---|
| | Income | Tax | Income | Tax |
| 1946 | $ 3,814.81 | $ 369.00 | $30,720.67 | $12,099.98 |
| 1947 (husband) | 3,040.44 | 327.00 | 11,156.42 | 2,564.47 |
| 1947 (wife) | 3,040.45 | 427.00 | 11,156.43 | 2,744.97 |
| 1948 | 3,395.43 | 205.00 | 5,667.38 | 693.52 |
| 1949 | 4,617.05 | 392.00 | 19,190.78 | 5,167.94 |
| Totals | $17,908.18 | $1,720.00 | $77,891.68 | $23,270.88 |

Petitioner waived trial by jury (R. 30), and on June 13, 1953, the court adjudged him guilty as charged in each count of the indictment (R. 9-12). However, a motion for judgment of acquittal was subsequently granted as to Counts IV and V, involving the years 1948 and 1949. (R. 13-14.) Petitioner was sentenced to eighteen months' imprisonment under the first and second counts, the terms to run concurrently, and to a $5,000 fine under the first count. (R. 14-16.) No sentence was imposed under the third count.

The evidence to support the verdict may be summarized briefly as follows:

The items comprising petitioner's visible net worth during the prosecution years were established by stipulation. (R. 41-63.) Although petitioner kept no books or records (R. 107, 169), his

visible net worth increased from $10,525 at the beginning of 1946 to $67,962.44 at the end of 1947 (R. 109-120). The income reported by petitioner and his wife for those years was $3,814.81 and $6,080.89, respectively. (Govt. Exs. 2-4.) Their correct income tax liability, based upon the net worth increases plus $720 per year for estimated living expenses, was $14,030.77 for 1946 and $4,791.42 for 1947 (R. 213-214), compared with tax liability shown on the returns of $[illegible] and $754, respectively (Govt. Exs. 2-4). In reconstructing the net worth, the Treasury agents examined public records and the records of local banks, interviewed petitioner's business associates, inquired of the proper Government agency as to the ownership of Government bonds, checked automobile sales agencies, audited the books of a liquor store in which the petitioner had a partnership interest, and interviewed the petitioner himself. (R. 108-113, 238, 239.)

The Government's net worth figures did not credit petitioner with any cash on hand as of the beginning of the prosecution years, *i.e.*, December 31, 1945, thus giving rise to his principal complaint here. (Pet. 6-12.) Although petitioner stated that he had never filed income tax returns prior to 1942 (Govt. Ex. 7, pp. 36-37), the Government's evidence showed that he had filed returns for the years 1940 through 1944 disclosing a total tax liability of $477.62, and that his 1945 return reflected income of $3,211.47 and a tax liability of $438 (Govt. Ex. 1, R. 172-173). It was also shown that between July, 1942, and October, 1945, peti-

tioner purchased 14 war bonds, 12 of which were in denominations of $25, $50 and $100 (R. 110-111), and that between 1939 and 1942 he was making payments of $50 to $200 per month on a piece of realty purchased in 1939 for $4,000 (R. 185-187, 191). Petitioner admitted that he had never received any gifts, inheritances, non-taxable income, or money from his wife. (Govt. Ex. 7, pp. 23-24, R. 168.)

During the agents' investigation, petitioner gave several explanations as to the source of the funds reflected in his increased net worth. When first contacted by an agent he stated that he had won the money gambling, but did not specify in what years. (R. 168-171.) A few days later he gave a sworn statement in the presence of his attorney, two Treasury agents, and a stenographer, in which he stated that by 1942 he had accumulated (and buried in the ground) some $50,000 in currency from bootlegging, prostitution and gambling, and had won an additional $25,000 to $30,000 by gambling on his own account while working at the Union Club, a gambling establishment where he was employed from 1943 to mid-1947. (Govt. Ex. 7, pp. 1-18, R. 77, 90-91.) He explained that he had never reported income from bootlegging and gambling because until recently he had been under the impression that such income was not taxable. (Govt. Ex. 7, pp. 36-39.) Several weeks later, after this statement had been reduced to writing, petitioner refused to sign it because by this time it had been decided that he would rely upon the

defense that the money had been embezzled by him from Mr. Hill, the owner of the Union Club. (R. 158-160, 194-196, 272-273.) Accordingly, petitioner's next position as to the source of his funds was that about $45,000 had been embezzled by him between 1943 and 1947 from the Union Club. (R. 150-160, 196-199.) His final position was that he had realized $40,000 from gambling subsequent to 1943. (R. 158.)

Petitioner's admissions that he was a gambler during the prosecution years (Govt. Ex. 7, pp. 15-19, R. 158, 171, 242-243) were generally corroborated by third parties (including the local chief of police) interviewed by the agents (R. 171, 188). The bookkeeper who had prepared the tax returns for the prosecution years testified that she had made it a practice to warn petitioner at the time of their preparation that gambling gains were taxable and that he had always told her he had no income except that appearing on the return. (R. 73-77, 84-85.) None of the returns reported any income from gambling. (Govt. Exs. 2-6.)

Petitioner did not testify at the trial, and the evidence presented by the defense consisted solely of stipulations that he had rented certain safe deposit boxes between 1937 and 1951 (R. 299-300), and that he had purchased a boat for $2,000 cash in 1942 (R. 300-301).

## ARGUMENT

Petitioner contends (Pet. 6-16) that the evidence was insufficient to support the verdict, because (a)

the starting point net worth was not firmly established, (b) the Government failed to investigate leads as to the sources of his funds, and (c) the net worth increases were not shown to stem from current taxable income. Brief examination of these contentions makes clear that they are without merit and that this is in no respect the kind of rare case which might justify review of fact findings by two lower courts.

(a) The evidence (*supra*, pp. 4-5) that petitioner was making monthly payments on the purchase of realty and acquiring war bonds in small denominations over a period of time tended to show that he had no substantial cash hoard between 1939 and 1945. *Barcott* v. *United States*, 169 F. 2d 929 (C.A. 9th). This inference was greatly strengthened by the evidence of his negative income tax filing history, his admission that he had never received nontaxable funds, and his conflicting explanations as to the source of the funds used to increase his net worth by some $57,000 in the two years 1946 and 1947 (*supra*, pp. 4-6). The Government's starting point evidence as such was not as strong as that adduced in *Holland* v. *United States*, 348 U.S. 121, and *Friedberg* v. *United States*, 348 U.S. 142, but there are present here two important admissions completely lacking in those cases: (1) that while he was employed at the Union Club between 1943 and 1947 petitioner realized between $25,000 and $30,000 in unreported personal gambling gains (Govt. Ex. 7, pp. 15, 36-39) and, later, (2) that

$40,000 of his net worth increase was attributable to his gambling activities during and after 1943 (R. 157-158). It is clear that this money was not reported in 1943, 1944 or 1945, and equally clear that little or none of it was invested in visible assets as of the end of 1945. Under these circumstances the trier of the facts was plainly entitled to draw the natural and logical inference that the income was received in the years in which it appeared in petitioner's visible net worth, 1946 and 1947.

There is no basis for the claim (Pet. 2-3, 9) that petitioner was convicted upon the "independent evidence" alone. This curious reversal of the corroboration problem considered in *United States* v. *Calderon*, 348 U.S. 160, and *Smith* v. *United States*, 348 U.S. 147, cannot obscure the dispositive point that petitioner's own admissions combined with the other evidence to establish his guilt. Nothing in the opinion below suggests that the Court of Appeals did—or that this Court should—determine whether the independent evidence was in itself sufficient to sustain the conviction. It is enough that this evidence supplied substantial proof that the offense had been committed, and that the evidence as a whole proved petitioner guilty. *Smith* v. *United States*, *supra*, at 156.

(b) The contention (Pet. 12-14) that the Government failed to investigate leads furnished by petitioner as to the sources of his increased net worth is equally without substance. There were no "leads" here of the type referred to in *Holland*

v. *United States, supra,* at 135-136—*i.e.,* specific and concrete assertions "reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." Petitioner's general and unverifiable statement that between 1920 and 1942 he had accumulated $50,000 in cash from bootlegging, prostitution and gambling, which he kept buried in the ground and had never reported for income tax purposes (Govt. Ex. 7, pp. 3-14, 36-39), was refuted in the only way it could be refuted—by circumstantial evidence negating the existence of any such hoard and showing that the source of his net worth increases during the prosecution years was current, unreported, taxable income (*supra,* pp. 3-6). Moreover, the shifting explanations petitioner offered included the assertion that he had won or embezzled between $25,000 and $45,000 at the Union Club between 1943 and 1947. (Govt. Ex. 7, pp. 14-18, R. 77, 90-91, 158, 196.) Thus, he helped to refute his own earlier hoard theory, further diminishing its significance as a so-called "lead" and adding to the demonstration of his guilt. Cf. *Brodella* v. *United States,* 184 F. 2d 823, 825-826 (C.A. 6th); *Gariepy* v. *United States,* 189 F. 2d 459, 463 (C.A. 6th). On this record, there was no reason for the trial judge to conclude that petitioner had supplied any significant leads which had not been checked and which should be regarded as sufficient to raise a reasonable doubt of guilt.

(c) Petitioner's remaining contention (Pet. 14-16) is that his net worth increases were not shown

to be attributable to currently taxable income. He states (Pet. 14):

> The conflict revolves about the admission of taxpayer that he was a gambler. Petitioner maintains that the admission related to the pre-prosecution years, while the Government contends that the admission relates to the prosecution years period.

We think the record is clear that petitioner's admissions that he was a gambler related to the prosecution years. (See Govt. Ex. 7, pp. 15-19, R. 158, 171, 242-243.) There was, at the least, evidence sufficient to warrant this inference by the trier of the facts. Petitioner's admissions were checked and corroborated by third parties interviewed by the agents (R. 171, 188) and by the fact that petitioner had worked in a gambling establishment during the years in question. Further corroboration was supplied by proof of net worth increases far in excess of reported income during a period when petitioner maintained no books or records (*Smith* v. *United States, supra*, at 158-159). In addition, petitioner admitted that he had never received gifts, inheritances, or other nontaxable funds. (Govt. Ex. 7, pp. 23-24, R. 168.) And in 1947, petitioner acquired another possible source of unreported income, a partnership interest with his brother in the Capitola Liquor Store. (R. 57-63, 192.) On this evidence, and in the light of petitioner's shifting and inconsistent explanations of his large net worth increases, the

trial judge was clearly entitled to infer that during the years 1946 and 1947 petitioner had received substantial income which he wilfully excluded from his income tax returns.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST, 1955.

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